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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-109

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

—against—

COMMUNITY SCHOOL BOARD No. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25,

Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Question Presented 2

Statement of the Case 2

Reasons for Granting the Writ 4

1. Constitutional principles of academic freedom limit the power of school boards even over allegedly educational matters 8

2. The removal of the book deprived students of their First Amendment right to know 10

Conclusion 12

Appendix

Opinion of the United States Court of Appeals 1a

Memorandum of Decision and Order 12a

Judgment 26a

Table of Authorities

Cases:

Adler v. Board of Education, 342 U.S. 485 (1952) (Black, J., dissenting) 11

Bartels v. Iowa, 262 U.S. 404 (1923) 8

Brown v. Board of Education, 347 U.S. 483 (1954) 7

PAGE

Damico v. California, 389 U.S. 416 (1967) 8

Epperson v. Arkansas, 393 U.S. 97 (1968) 4, 5, 8, 9

Garrity v. New Jersey, 385 U.S. 493 (1967) 10
Ginsberg v. New York, 390 U.S. 629 (1968) 11

Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) 9
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 7, 9

McNeese v. Board of Education, 373 U.S. 668 (1963) 8
Meyer v. Nebraska, 262 U.S. 390 (1923) 8, 10
Monroe v. Pape, 365 U.S. 167 (1961) 8

NAACP v. Button, 371 U.S. 415 (1963) 10

Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) 9

Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955) .. 9
Shelton v. Tucker, 364 U.S. 479 (1960) 5-6, 10
Stanley v. Georgia, 394 U.S. 557 (1969) 7
Sweezy v. New Hampshire, 354 U.S. 234 (1957) 5

Tinker v. Des Moines Indep. Community School District, 393 U.S. 503 (1969) 8, 11

West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943) 6, 8

Constitutional Provisions:

United States Constitution

First Amendment 2, 9, 10

PAGE

Statute:

28 U.S.C. 1254(1) 2

Other Authorities:

Hutchins, Robert, "The Constitution of Public Education," *The Center Forum*, Vol. II, No. 4 (July 1969) 10

Nelson and Roberts, *The Censors and the Schools*, 28-37 (1963) 4

New York Times, April 12 and 14 and June 17, 1972 .... 6, 7

Note, "Dismissal of Federal Employees—The Emerging Judicial Role," 66 Col. L. Rev. 719 (1966) 10

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on March 21, 1972.

Opinions Below

The opinion of the district court is not officially reported. It is set out in the Appendix, *infra,* pp. 12a to 25a. The opinion of the Court of Appeals is reported at 457 F.2d 289 and is set out in the Appendix, *infra,* pp. 2a to 11a.

Jurisdiction

The judgment of the Court of Appeals was entered on March 21, 1972. On June 8, 1972, Mr. Justice Marshall issued an order extending the time within which to file this petition for writ of certiorari up to and including July 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether a school board violates the First Amendment rights of the librarian and students when it orders the removal from a school library of a critically acclaimed and serious book, concededly lawful for distribution to minors, because it contains four-letter words and describes sexual activities.

Statement of the Case

This civil rights action concerns a book entitled *Down These Mean Streets,* by Piri Thomas, a highly acclaimed work portraying the process of growing up in the Puerto Rican ghetto of East Harlem in New York City. Copies of the book were purchased by the librarians for three

junior high schools in New York City's Community School District No. 25. The copies remained in the libraries, available for student use, until a parent complained that *Down These Mean Streets* contained four-letter words and described sexual activities. In response to the parent's complaint, Community School Board No. 25 adopted the following resolution by a vote of 5-3, on April 19, 1971:

> "The Superintendent is hereby directed to remove *Down These Mean Streets* from all student libraries in the district."

This lawsuit, brought on behalf of a librarian, a principal, teachers, students and parents of students at schools at District 25, followed. Subsequently, on June 2, 1971, the Board passed a so-called "parent option plan" which permitted those schools which originally had the book to permit its direct loan to parents. Other schools in the district remained under the ban imposed by the Board's original resolution.

The librarian and teachers who used the book in class submitted affidavits expressing the belief that it was a particularly effective portrayal of life in the ghetto and an important adjunct to the junior high school curriculum. Those supporting the ban, however, thought that the book's language was too harsh and that its occasional depictions of sex would adversely affect the emotional and psychological development of the early teenage youngsters reading it.

In reply affidavits, junior high school students made light of the suggestion that they were unfamiliar with or would be led astray by the language or sex scenes in the book, adding that the book made them more sensitive to

the conditions endured by those who live in the slums. Several eminent psychologists and psychiatrists dismissed as simplistic and unsupportable the contention that the scenes depicted in *Down These Mean Streets* could have an adverse impact on the psychological development of children.

Reasons for Granting the Writ

Despite the frequency with which local pressure groups succeed in persuading school boards to purge controversial books,[1] the constitutional issues presented by this practice have never been decided by this Court. It is the issue touched upon but left undecided in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), namely, to what extent are school professionals at the mercy of politically responsive, often elected, lay boards of education in determining what their

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[1] Campaigns against school books have been waged by, among others, the American Legion and Veterans of Foreign Wars (texts were "un-American"), the Ku Klux Klan (books favored "papists and anti-Christian Jews of the Bolshevik Socialist stripe"), DAR (insufficient emphasis on military history), National Council for Prevention of War (insufficient emphasis on the peace-loving qualities of American heroes), organized labor, WCTU, and the National Association of Manufacturers (books "laced with anti-business sentiment and economic determinist and socialistic theories"). Nelson and Roberts, *The Censors and the Schools*, 28-37 (1963).

Nor is the problem one which has been confined to the distant past. A perusal of issues of the American Library Association *Newsletter on Intellectual Freedom* for the past two years reveals attacks on libraries for shelving books such as Cleaver, *Soul On Ice;* Roth, *Goodbye Columbus;* Brown, *Manchild in the Promised Land;* Griffin, *Black Like Me;* Carmichael, *Black Power;* Salinger, *Catcher in the Rye;* an anthology of modern literature because it contained such reputedly Communist authors as Langston Hughes, Richard Wright, Woody Guthrie, Martin Luther King, Malcolm X and Dick Gregory. It is noteworthy that books by nonwhite authors appear to come under particular attack.

students may read and learn in the schools. More than loyalty oaths, more than security investigations, more than armbands, it is an issue which lies at the heart of academic freedom. The issue was framed in *Epperson* as follows:

> "By and large, public education in our Nation is committed to the control of state and local authorities. . . . On the other hand, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' Shelton v. Tucker, 364 U.S. 479, 487 . . . ." *Id.* at 104.

Given the recurrence of attacks on school books, it is hardly an exaggeration to suggest that the resolution of those conflicting principles may well determine whether any book which challenges the current orthodoxy will be permitted in the schools. Regrettably, the courts below, showing almost unquestioning deference to the judgment of the school board, have indicated that libraries are not an area in which constitutional freedoms need receive "vigilant protection." While the limits of that viewpoint are not spelled out, the courts below would apparently not interfere with school boards which systematically purged the libraries of all books advocating peace or integration, or their curricula of all courses treating the United Nations. And, although the opinion suggests some solicitude for teachers who are actually dismissed, the courts' reasoning leaves little doubt that teachers who persisted in mentioning those subjects over the objections of the school board would do so wholly without constitutional protection. When this Court has so consistently defended the academic profession against the vagaries of political influence, *e.g.*, *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *Shelton*

v. *Tucker*, 364 U.S. 479 (1960); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), it would be ironic indeed if the federal judiciary were now to indulge such direct political intrusion into the materials that teachers will be permitted to assign.

Some recent newspaper stories illustrate the issues which are at stake here. In Connecticut, a school board ordered the book *Boss*, a political biography of Chicago Mayor Richard Daley, removed from a high school reading list because, as one Board member explained, it "slandered" local law enforcement officials and "doesn't tell the truth." *New York Times*, April 12, 1972. A New Jersey school board forbade its high school library from purchasing four books, including John Kenneth Galbraith's *The Affluent Society*, as reference materials for a federally funded American studies course. As the president of the Board of Education explained, "In my opinion, the books were too liberal and I disagree with their points of view." *New York Times*, June 17, 1972.

For the court below, this is only "intramural strife" which does not justify "intrusion of the judiciary into the internal affairs of the school." But if the judiciary does not intervene, to whom may parents, students and professionals look when their libraries and their curricula are stripped of books which happen to be in political disfavor with a shifting majority of the school board? Who, if not the federal courts, will prevent our nation's schools from becoming instruments of majoritarian propaganda? If, as appears to be the case, school boards are especially responsive to demands that schools not carry books which honestly deal with race relations in America,[2] will minori-

[2] See note 1, *supra*.

ties ever be able to secure the promise of *Brown* v. *Board of Education*, 347 U.S. 483 (1954)? To abstain from controversies such as this will indeed create a "pall of orthodoxy," *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967), over our public schools.

The point was well made by a *New York Times* editorial entitled "Censors at Work," prompted by the Connecticut incident.

> "[C]ontrary to all denials, the exercise of the veto power over reading lists or library collections by school boards amounts to establishment of censorship —the removal of books for other than educational reasons. Teachers, librarians and school administrators naturally make choices concerning books—including textbooks—which are appropriate to the schools' purpose. But the introduction of either literary or political criteria by school board members—or of the even more elusive judgment of what constitutes 'truth' in a political volume—is a threat both to education and to freedom." April 14, 1972.

That philosophy has been given judicial expression in *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969):

> "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

I.

Constitutional principles of academic freedom limit the power of school boards even over allegedly educational matters.

To plaintiffs' contention that the ban of *Down These Mean Streets* from the shelves of the school district's libraries is unconstitutional,[3] the court below answers matter-of-factly that someone, after all, "has to make a determination as to what the library collection will be." Since the school board is given, by statute, ultimate responsibility for instruction within its schools, the court suggests that *any* determination which the board makes regarding its library collection is beyond judicial review. That position is not consistent with long-standing precedents of this court. To say that the school board has the conceded power to make educational decisions affords those decisions no greater immunity from constitutional principles than previous attempts to disguise unconstitutional actions with an educational veneer. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Bartels* v. *Iowa*, 262 U.S. 404 (1923); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). In the words of one circuit court,

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[3] Although the court makes reference to the availability of "administrative procedures" and state judicial remedies for review of the "wisdom or the efficacy" of the school board's action, it is clear that the court did pass on the question of its constitutionality. It is, of course, settled law that persons seeking redress of constitutional rights by means of a 1983 action need not exhaust state judicial, *Monroe* v. *Pape*, 365 U.S. 167 (1961) or administrative remedies. *Damico* v. *California*, 389 U.S. 416 (1967); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

"[d]iscretionary power does not carry with it the right to its arbitrary exercise." *Shachtman* v. *Dulles,* 225 F.2d 938, 941 (D.C. Cir. 1955).

Two recent cases involving the dismissals of teachers using teaching materials of which the school boards disapproved are illustrative. In *Keefe* v. *Geanakos,* 418 F.2d 359 (1st Cir. 1969) and *Parducci* v. *Rutland,* 316 F. Supp. 352 (M.D. Ala. 1970), the school boards, as here, objected to the use of books which contained profanities and "vulgar" terms. Both courts found that interests of academic freedom outweighed the boards' conceded interest in regulating educational matters in their schools and reinstated the teachers. To the extent that the courts below dismiss those cases as inapplicable because the teachers there had been fired, while the librarian here had not, they impose a burden on challengers of unconstitutional action which is as unfair as it is unprecedented. See, e.g., *Epperson* v. *Arkansas,* 393 U.S. 97 (1968); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). It was the school board's order removing the book, and not the librarian's response, which implicated First Amendment values. It should not be and is not the law that she had to defy the ban and risk dismissal, with its attendant disruption of school functions, before having the right to challenge it.

This is an easier case than either *Keefe* or *Parducci.* In those cases, the books were *assigned* as a part of the classroom curriculum, thereby precluding alternative instructional materials which the school board could argue were more educationally valuable. In this case, the judgment of the librarians conflicted with no interest of the school board. The books' retention in the library would exclude no other books considered more valuable nor take up any

class time that could be put to better use. Thus, the broad implications of this Court's opinion in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), need not be considered. See generally, Hutchins, "The Constitution of Public Education," *The Center Forum*, Vol. II, No. 4 (July 1969).

II.

The removal of the book deprived students of their First Amendment right to know.

The court below, interpreting the students' argument as claiming an "unqualified first amendment right of access to books, unless they are obscene," found no constitutional deficiency in the removal of the book. But the students claim no such unqualified right. Rather, they assert three propositions: (1) that they no longer have access to a book previously available to them; (2) that their right to know has, to that extent, been impaired; and (3) that no "compelling" or "substantial" state interest justified that impairment. *NAACP* v. *Button*, 371 U.S. 415, 438, 444 (1963). The court's search for an unqualified right in this case is misplaced. The focus instead must be on what state interest is served by the board's action. "[T]he view that a 'right must be infringed before a remedy can be fashioned, has been steadily eroded; the focus of inquiry has shifted from identification of individual rights to an examination of the reasonableness of government action." Note, "Dismissal of Federal Employees—The Emerging Judicial Role," 66 *Col. L. Rev.* 719, 734 (1966). See, e.g., *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

If such compelling state interests were apparent, such as the "financial and architectural realities" suggested by the Second Circuit, the board's decision would raise no constitutional issues. But those realities were never even hinted at in this case. The school board was not engaged in the process of selecting books for its libraries. If it were, its decision to spend its limited dollars on books other than *Down These Mean Streets* would be defensible on educational grounds and beyond judicial review. Nor was there ever the suggestion that "architectural" considerations, such as limited shelf space, motivated the book's removal.

Two decisions of this Court treating the rights of minors, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) and *Ginsberg* v. *New York*, 390 U.S. 629 (1968), provide the framework for determining whether a sufficient state interest can be shown to justify removal of the book. The court below conceded that the book had created no "substantial disorder" and expressed no opinion as to whether the book was obscene for minors.

The Court of Appeals sums up its rejection of plaintiffs' constitutional claims by pointing out that "discussion of the book or the problems which it encompasses or the ideas it espouses have not been prohibited by the Board's action . . . ." Conveniently ignored is the fact that the book itself cannot be read. To permit school boards arbitrarily to deprive students of the opportunity to read books previously available in the school library violates the principle that "government should leave the mind and spirit of man absolutely free . . . . [P]ublic officials cannot be constitutionally vested with powers to select the ideas people can think about. . . . " *Adler* v. *Board of Education*, 342 U.S. 485, 497 (1952) (Black, *J.*, dissenting).

CONCLUSION

For the reasons stated above certiorari should be granted.

Respectfully submitted,

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July 19, 1972

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 494—September Term, 1971.

(Argued February 22, 1972 Decided March 21, 1972.)

Docket No. 71-1958

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Plaintiffs-Appellants,

—against—

COMMUNITY SCHOOL BOARD No. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25, and ANTOINETTE MCCARTHY,

Defendants-Appellees.

Before:

MEDINA, LUMBARD and MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, *Judge,* dismissing appellants' complaint which alleged that a resolution of a local community school board requiring the

removal of a particular book from the junior high school libraries within its jurisdiction violated the first amendment of the constitution.

Affirmed.

ALAN H. LEVINE, New York, New York (New York Civil Liberties Union, New York, N.Y., Burt Neuborne, of counsel), *for Plaintiffs-Appellants.*

HAROLD F. HAY, Forest Hills, New York, *for Defendants-Appellees.*

O'LEARY & O'LEARY, Jamaica, New York, *for Intervenor Defendant-Appellee Antoinette McCarthy.*

IRWIN KARP, New York, New York, *for The Authors League of America, Inc., Amicus Curiae.*

MULLIGAN, *Circuit Judge:*

This is an appeal from an order of Chief Judge Jacob Mishler, United States District Court, Eastern District of New York, dismissing plaintiffs' civil rights action which was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343, seeking an injunction and declaratory relief against Community School Board No. 25, Queens, New York, Cormac K. Meagher, Community Superintendent of Community School District No. 25, and Antoinette McCarthy, a representative of the Committee for Parents' Rights in Public Education. We affirm.

The plaintiffs-appellants in this case are the Presidents Council, District 25, an organization of presidents and past presidents of various parent and parent-teacher associations in the district, three junior high school students

enrolled in schools in the district, seven parents and guardians of minors who attend junior high schools in the district, two teachers, a librarian and the principal of a junior high school, all within the district and under the jurisdiction of the Board. This litigation commenced as a result of the decisions of the duly elected Community School Board (hereinafter Board) of Community School District 25 (hereinafter District), which in executive session on March 31, 1971, voted five to three to remove from all junior high school libraries in the District all copies of *Down These Mean Streets,* a novel by Piri Thomas. At a public meeting on April 19, 1971 the resolution was again duly adopted by a vote of five to three. Pursuant to the resolution the defendant community superintendent had the book removed. At a public meeting of the Board on June 2, 1971 a resolution was unanimously passed permitting the book to be kept at those schools which previously had the book in their libraries but making it available on a direct loan basis to the parents of children attending these schools.

It is conceded by the parties in this suit that the Board was duly and legally elected and that the resolutions were duly adopted by the Board at the public meetings of April 19 and June 2, 1971. It is further uncontested that the students at the three junior high schools affected (Junior High School Nos. 185, 189 and 218) range in age from 11 to 15 years. The parties do not dispute that in New York City the selection of textbooks and other instructional material has been delegated by the Legislature of the State of New York to the Community School Board.[1] It is also

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1 N.Y. Educ. Law §2590-e (3) (McKinney 1970) provides:

§2590-e. Powers and duties of community boards

Each community board shall have all the powers and duties, vested by law in, or duly delegated to, the local school board districts and the board of education of the city district on the effective date of this article, not inconsistent with the provisions of this article and the policies established by the city board, with respect to the control

clear that there are administrative procedures available to review the decisions of the Community School Boards in New York.[2] Any final administrative action is reviewable under Article 78 of the New York Civil Practice Law and Rules.[3]

The book, which has created the controversy and provoked the action of the Board, *Down These Mean Streets*, is an autobiographical account by Piri Thomas, of a Puerto Rican youth growing up in the East Side Barrio (Spanish Harlem) in New York City. Predictably the scene is depressing, ugly and violent. The argot of the vicinage is replete with four letter and twelve letter obscenities unreported by Tom Swift or even Tom Jones. Acts of criminal violence, sex, normal and perverse, as well as episodes of drug shooting are graphically described. The book has

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and operation of all pre-kindergarten, nursery, kindergarten, elementary, intermediate and junior high schools and programs in connection therewith in the community district. The foregoing shall not be limited by the enumeration of the following, each community board shall have the power and duty to:

. . . .

3. determine matters relating to the instruction of students, including the selection of textbooks and other instructional materials; provided, however, that such textbooks and other instructional materials shall first have been approved by the chancellor.

2 N.Y. Educ. Law §310 (5)-(6) (McKinney 1970) provides for an appeal to the state commissioner of education by any person "conceiving himself aggrieved" by any action by the trustees of any school library in relation to the books therein or by any action by any district meeting in relation to the library. See *e.g.*, *In the Matter of Korublum*, 70 St. Dept. Rep. (Educ.) 19 (1949) where the commissioner held that a citizen and taxpayer had no constitutional right to compel the Board of Education of the City of New York to retain the magazine, "The Nation", in its school libraries.

Further, N.Y. Educ. Law §2590-*l* (McKinney 1970) empowers the chancellor of the city school district of the City of New York to override any decision of a community board inconsistent with the educational policies of the city board.

3 See *e.g.*, *Rosenberg* v. *Board of Educ.*, 196 Misc. 542, 92 N.Y.S. 2d 344 (Sup. Ct. 1949).

been made available to the court and in a soft cover reprint is available to the public for an investment of $1.25. Presumably the educational value of this work, aside from whatever literary merit it may have, is to acquaint the predominantly white, middle-class junior high school students of Queens County with the bitter realities facing their contemporaries in Manhattan's Spanish Harlem. Some parents objected to the public school library stocking the book, which they claimed would have an adverse moral and psychological effect on 11 to 15 year old children, principally because of the obscenities and explicit sexual interludes. The plaintiffs on the other hand have supplied affidavits from psychologists, teachers, and even children who claim the book is valuable and had no adverse effect on the development of the children of the District. One thirteen year old boy solemnly swears and assures us that the book has "literary merits" and is not a "corruptive influence".

Since the Legislature of the State of New York has by law determined that the responsibility for the selection of materials in the public school libraries in New York City is to be vested in the Community School Board (n. 1, *supra*), and the Commissioner of Education of that State has defined the purposes of the public school library,[4] and in further view of the procedures for administrative and state court review provided in New York (nn. 2 and 3,

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4 The regulations of the Commissioner of Education of New York State provide:

"The book collection in the secondary schools shall consist of books approved as satisfactory for: (1) Supplementing the curriculum, (2) reference and general information, (3) appreciation and (4) pleasure reading. The course of study and the interest of boys and girls of given ages and grades are factors which should play a large part in the selection of books for a school library. Books of established quality and authority in sufficient quantity to meet all school needs are recognized as necessary tools and materials of instruction." 8 N.Y. Code, Rules & Regs. (Educ.) §91.1(b) (1966).

supra), we do not consider it appropriate for this court to review either the wisdom or the efficacy of the determinations of the Board. Our function is purely one of constitutional adjudication on the facts and the record before us: has the Board transgressed the first amendment rights of the plaintiff teachers, parents, librarian and children. In its most recent pronouncement on the subject the Supreme Court has stated: "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) (footnote omitted).

After a careful review of the record before us and the precedents we find no impingement upon any basic constitutional values. Since we are dealing not with the collection of a public book store but with the library of a public junior high school, evidently some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars. When the court has intervened, the circumstances have been rare and extreme and the issues presented totally distinct from those we have here.

See *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1051-54 (1968).

In *Epperson* v. *Arkansas*, *supra*, the court did strike down a state statute which made it unlawful for a teacher in any state supported school to use a text book that teaches that men are descended from a lower order of animals. The court vitiated the statute on the specific ground that "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion." 393 U.S. at 106. "The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment." *Id.* at 107. Here, patently we have no religious establishment or free exercise question, and neither do we have the banning of the teaching of any theory or doctrine. The problems of the youth in the ghetto, crime, drugs and violence have not been placed off limits by the Board. A book has been removed but the librarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom. The action of the Board does not even preclude the teacher from discussing *Down These Mean Streets* in class or from assigning it for outside reading. In those libraries which have the book, the parent can borrow it and, if he sees fit, can loan it to his child if he wishes to read it.[5] The intrusion of the Board here upon any first amend-

5 In *Ginsberg* v. *New York*, 390 U.S. 629 at 639 (1968) Mr. Justice Brennan, recognizing the prime responsibility of parents for the well-being of their children, pointed out that the statute barring the sale of salacious material to children did not preclude the parent from purchasing it for their children. Here the school at state expense is making the book available to parents who may wish their children to read it.

ment constitutional right of any category of plaintiffs is not only not "sharp" or "direct", it is miniscule.

Appellants' reliance upon *Ginsberg* v. *New York*, 390 U.S. 629 (1968) is puzzling. In that case the Court upheld the constitutionality of a New York statute (N.Y. Penal Law §484-h (McKinney 1967)) which made it a crime to sell defined obscene material to minors under 17 years of age, whether or not the material would be obscene for adults. In upholding the concept of "variable obscenity" the court found the statute to be a rational legislative determination that the exposure of minors to such materials might be harmful and that the statute did not involve any invasion of constitutionally protected freedoms. Appellants' reading of the case as authority for the proposition that minors have an unqualified first amendment right of access to books, unless they are obscene under the statute, is totally unjustified. It equates the public school library, which has a function as an adjunct to the educational venture, with the entrepreneur seller of books who has no comparable responsibility. The public school library obviously does not have to become the repository, at public expense, for books which are deemed by the proper authorities to be without merit either as works of art or science, simply because they are not obscene within the statute. If someone authored a book advocating that the earth was flat, it could hardly be argued that the work could not be removed from the public school library unless it was also obscene. Appellants concede, or at least do not reject, the proposition that the Board has ultimate authority for the initial selection of the public school library collection. They suggest, however, that we have a different case where, as here, the book was once shelved and is now removed. They analogize the shelving and unshelving of a book to the constitutional right of a person to obtain

public employment and his rights to retain such employment when it is sought to be terminated. This concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover. It would seem clear to us that books which become obsolete or irrelevant or where improperly selected initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place.

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) is equally far afield. There the court did intrude into the field of public education by invalidating a regulation of school principals which suspended students who wore black armbands to classes symbolizing their objection to hostilities in Vietnam. This was deemed a violation of their right to free speech under the first amendment in the absence of a showing that the conduct of the students materially disrupted classwork or involved substantial disorder or invasion of the rights of others. The appellant conveniently ignores the factual setting of *Tinker* but would have us apply its test. Since the shelving of *Down These Mean Streets* did not create any disruption or disorder, it is argued, it should remain on the shelf. There is here no problem of freedom of speech or the expression of opinions on the part of parents, teachers, students or librarians. As we have pointed out, the discussion of the book or the problems which it encompasses or the ideas it espouses have not been prohibited by the Board's action in removing the book.

The administration of any library, whether it be a university or particularly a public junior high school, involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where

there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept.[6]

Appellant finally urges upon us two cases *Keefe* v. *Geneakos*, 418 F. 2d 359 (1st Cir. 1969) and *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970). Both of these cases involved high school teachers of junior and senior students who assigned material for outside reading which school officials found offensive and inappropriate. Upon a refusal to comply with the orders of school authorities to desist, the teachers were discharged. To the extent that these cases hold that first amendment rights have been violated whenever a district court disagrees with the judgment of school officials as to the propriety of material assigned by a teacher to students, we are not in accord.[7] In any event, both cases involved the discharge of teachers with concomitant issues of procedural due process which are not present here and therefore the cases are not controlling.[8]

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6 Other Supreme Court cases relied upon by appellants are inapposite. In *Shelton* v. *Tucker*, 364 U.S. 479 (1960) the court found unconstitutional an Arkansas statute requiring public school teachers to file annual affidavits listing all organizational affiliations without limitation for a five year retroactive period; in *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) the court invalidated New York teacher oath and loyalty laws as vague and ambiguous. In contrast, there is no inhibition of extramural teacher or librarian association whatsoever in the case before us. If the Board ordered a list of all books read or owned by the staff, these cases might be in point.

7 While the First Circuit has indicated that it does not "regret" its decision in *Keefe* v. *Geneakos*, *supra*, its enthusiasm for intrusion into academic issues seems to be lessening, see *Mailloux* v. *Kiley*, 436 F.2d 565, 566 (1st Cir. 1971) and *Mailloux* v. *Kiley*, 448 F.2d 1242 (1st Cir. 1971).

8 That the discharge of the teacher in *Keefe* v. *Geneakos*, *supra*, was a vital fact is apparent from its decision (418 F.2d at 362), when it emphasized this element to distinguish the facts from *Parker* v. *Board of Educ.*, 237 F. Supp. 222 (D. Md. 1965). In that case the teacher was not discharged, but since he had no tenure, there was no obligation to renew his contract. On this point the lower court was affirmed in 348 F.2d 464 (4th Cir. 1965) *cert. denied*, 382 U.S. 1030 (1966).

In view of the facts in the record before us and the controlling precedents, we find no constitutional infirmity in the resolutions of the Board.

Affirmed.

Memorandum of Decision and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 71-C-601

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend, Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES & EVELYN SUSSMAN,

Plaintiffs,

—against—

COMMUNITY SCHOOL BOARD NO. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25, and ANTOINETTE MCCARTHY,

Defendants.

August 4, 1971

This is a civil rights action brought pursuant to 42 U.S.C. §1983, jurisdiction being grounded on 28 U.S.C. §1343. Plaintiffs,[1] in their amended complaint, claim that

[1] Plaintiffs are (a) Presidents Council District 25, an organization of presidents and past presidents of various parent and parent-teacher associations in Community School District No. 25; (b)

defendants,[2] acting under color of state law, have deprived them of rights secured to them by the First Amendment, and of due process of law as guaranteed by the Fourteenth Amendment. They seek an injunction and declaratory relief.

A hearing was held on the motion for a preliminary injunction on June 1, 1971. Subsequently, plaintiffs moved for summary judgment or alternatively for both a temporary and permanent injunction, praying further that any additional hearing which the court might find necessary be consolidated with a trial on the merits pursuant to F.R.Civ.P. Rule 65(a)(2). Defendants Community School Board No. 25 and Antoinette McCarthy have moved to dismiss the complaint or alternatively for summary judgment. Several briefs have been submitted *amicus*

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three students, one attending Junior High School 185, and the other two attending Junior High School 189, both schools being within Community School District No. 25 and under the jurisdiction of the defendant Community School Board (Board); (c) seven parents and guardians of minor children attending Junior High Schools 185, 189 and 218, all within Community School District No. 25 and under the jurisdiction of the Board; (d) two teachers working at Junior High School 189, which school is within Community School District No. 25 and under the jurisdiction of the Board; (e) a librarian at Junior High School 185, which school is within Community School District No. 25, and under the jurisdiction of the Board; and (f) the Principal of Junior High School 189, which school is within Community School District No. 25, and under the jurisdiction of the Board.

[2] Defendants are (a) Community School Board No. 25, the duly elected school board of Community School District No. 25, Queens, New York; (b) Cormac K. Meagher, duly appointed Community Superintendent of Community School District No. 25; and (c) Antoinette McCarthy, individually and as a representative of the Committee for Parents' Rights in Public Education. [Mrs. McCarthy was not an original defendant, but moved to intervene as such subsequent to the filing of the complaint, which motion was granted.]

curiae.[3] A hearing was held on July 16, 1971, at which all of the above mentioned motions were argued.

Plaintiffs' claim arises out of the following circumstances: on March 31, 1971, defendant Community School Board (Board), of Community School District No. 25 (District), meeting in executive session, voted five to three to remove all copies of *Down These Mean Streets*, a novel by Piri Thomas, from the school libraries of all schools under the jurisdiction of the Board. This resolution was duly adopted at a public meeting held on April 19, 1971, where it again passed by a vote of five to three.[4] According to a direction contained in the resolution defendant Community Superintendent Meagher (Superintendent) had the book removed from those school libraries which had copies.[5]

Plaintiffs allege that the resolution adopted by the Board, and the action taken by the Superintendent in com-

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[3] The *amici* are: (a) Hyman Rosner, Betty Louise Felton, James O'Hara, and Edna Turner, minority members of Community School Board No. 25; (b) Local 2 of the American Federation of Teachers (AFL-CIO); and (c) the Author's League of America.

[4] The resolution adopted by the Board at its public meeting of April 19, 1971, reads as follows:

> The Superintendent is hereby directed to remove "Down These Mean Streets" by Piri Thomas from all student libraries in the district.
>
> The Board hereby instructs Dr. Meagher to immediately appoint a professional committee to recommend to the Board guidelines for the selection of books.

[5] "Down These Mean Streets" is an autobiographical novel describing the childhood of a boy in Spanish Harlem. It gives a vivid picture of the material and cultural deprivation to which the boy was subject, the sordid existence of which he partook, and the bitter humor with which he and his fellows attempted to leaven their lot. It is revealing in its exposition of the racial tensions between Blacks, Whites and Puerto Ricans. Homosexual and heterosexual acts are candidly described with a liberal sprinkling of four letter words in past, present and future tenses.

pliance with that resolution, deprive all of them of ". . . their rights to academic freedom under the First Amendment . . . " (Amended Complaint, ¶16), and further deprive the teacher, librarian and principal plaintiffs of ". . . their liberty to freely practice their profession in accordance with professional standards in violation of the due process clause of the Fourteenth Amendment." (Amended Complaint ¶17). Accordingly, plaintiffs request that the court declare the resolution adopted by the Board unconstitutional, and order the defendants to replace the book on the shelves of the libraries from which it was removed, and enjoin them from interfering with other school libraries within their jurisdiction which desire to purchase the book.[6]

The following facts are either conceded by all parties or uncontested:

1. The Board is the duly and legally elected Community School Board of Community School District No. 25.

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[6] At a special public meeting held subsequent to the initiation of the suit, (the original complaint was filed on May 19, 1971), the Board adopted, by a 5-0 vote, with three abstentions, a resolution modifying the original resolution adopted on April 19, 1971. The text of this resolution, passed at the public meeting on June 2, 1971, is as follows:

> The district copies of *Down These Mean Streets* shall be kept at the schools which previously had the book in their respective libraries, and shall be loaned directly to the parents of the children attending these schools who request the book. The Superintendent shall establish and forthwith put into effect a procedure for the implementation of the above.

On June 25, 1971, the plaintiffs filed an amended complaint realleging everything that had been contained in the original complaint, but also alleging the passage of the above resolution, and alleging that it too was unconstitutional on the grounds already discussed. The amended prayer seeks to have both resolutions declared unconstitutional, and to have the operation of both enjoined.

2. Cormac K. Meagher is the duly appointed Community Superintendent of Community School District No. 25, chosen by the Board.

3. The power of the state to determine matters relating to the education of students, including the prescription of a curriculum and the selection of textbooks and other instructional material, has been delegated by the New York State Legislature to the duly elected Community School Boards in New York City.[7]

4. The resolutions adopted by the Board at the public meetings held on April 19, 1971 and June 2, 1971 were duly adopted by the Board.

5. *Down These Mean Streets,* by Piri Thomas, was removed from the school libraries of Junior High Schools 185, 189 and 218 pursuant to the resolution adopted by the Board on April 19, 1971, by defendant Superintendent, and other schools in the District were barred from placing the book on their library shelves.

6. The students at Junior High Schools 185, 189 and 218 range in age from 11 to 15 years.

7. (a) The state has provided administrative procedures for the review of arbitrary actions on the part of Community School Boards.[8]

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[7] N.Y. Education Law, §2590-e.

> . . . each community board shall have the power and the duty to:
>
> . . .
>
> 3. determine matters relating to the instruction of students, including the selection of textbooks and other instructional materials; provided, however, that such textbooks and other instructional materials shall first have been approved by the chancellor.

[8] New York Education Law §§310 and 2590-1.

(b) Final administrative action is reviewable under Article 78 of the New York Civil Practice Law and Rules.

Discussion

Plaintiffs are divided into three sets: (a) the students; (b) the parents and guardians; and (c) the teachers, librarian and Principal. The rights of each of these sets, and their possible infringement, must be discussed separately, since they differ one from another as alleged and argued by plaintiffs' counsel.

Plaintiff students claim that they have a right to know, or right of access to publications, under the First Amendment. They claim the right to read *Down These Mean Streets* without restriction, citing *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733 (1969). They see *Ginsberg* v. *New York,* 390 U.S. 629, 88 S.Ct. 1274 (1968) as requiring the Board to make the book available absent a finding of obscenity. Further, they find the resolution of June 2, 1971, called by them the "parent option plan," an abridgment of their First Amendment rights under *Lamont* v. *Postmaster General,* 381 U.S. 301, 85 S.Ct. 1493 (1965).

Tinker held that high school students were "... entitled to freedom of expression of their views," 393 U.S. at 511, 89 S.Ct. at 739, in demonstrating their opposition to the Viet Nam war. It is significant that in *Tinker* the Court dealt with and spoke of a right of *expression.* It said nothing of the corollary right of *access* to publications, i.e., the right to know.[9]

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[9] It is also significant that the Court put distinct limits on the exercise of the students' right of free expression:

"... [b]ut conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of

A child's First Amendment right of access to reading material is not co-extensive with the right of adults. *Ginsberg* v. *New York, supra*, 390 U.S. at 636-37, 88 S.Ct. at 1279. In *Ginsberg*, the Court rejected appellant's argument "... that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor." 390 U.S. at 636, 88 S.Ct. at 1279. Rather, the Court approved a distinction between children and adults when constitutional liberties and their exercise are involved: "... we have recognized that even where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." [Citing *Prince* v. *Massachusetts*, 321 U.S. 158, 170, 64 S.Ct. 438, 444 (1944)] 390 U.S. at 638, 88 S.Ct. at 1280. The Court then went on to uphold the New York statute attacked by the appellant, which statute made criminal the furnishing to children of sexually-oriented reading matter which would concededly have been constitutionally protected reading matter were the rights of an adult involved.[10] *Ginsberg* in no way stands for the proposition advanced by plaintiffs in reliance upon it: that if a state cannot totally ban a book it cannot bar its school libraries from loaning it.

This court must thus conclude that the students had no constitutional right to have *Down These Mean Streets*

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behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513, 89 S.Ct. at 740.

[10] The Court had previously intimated that such a position would be taken, were the case to arise, as it subsequently did. *See Jacobellis* v. *Ohio*, 378 U.S. 189, 195, 84 S.Ct. 1676, 1682 (1964).

freely available to them in the school libraries. On the contrary, the Board, acting pursuant to its statutory powers, had discretion to order the book or refuse to do so, to put it on the school library shelves or remove it therefrom. The Board has the general power to determine curriculum, which must of necessity include the selection of reading matter to be available in the schools, subject only to certain powers of the Chancellor of the New York City School System.

Having no right to have the book available to them in school, no right is abridged by the institution of the "parent option system." In *Lamont* v. *Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493 (1965), the Court struck down a statute requiring addressees to whom unsealed Communist propaganda is consigned to perform an "official act" in order to receive the propaganda through the mail. The Court considered this requirement " . . . an unconstitutional abridgment of the addressee's First Amendment rights," in that it would tend to chill the exercise of those rights. As the exercise of a child's First Amendment right of access within a public school is subject to the discretionary power of the Board, and the Board may constitutionally ban the book from the schools entirely, the Board, in adopting the "parent option system," is not infringing any right but rather granting one where none before existed.

Plaintiff parents concede that " . . . the state has a legitimate interest in the education of its minor citizens . . . " (Plaintiffs' Memorandum of Law, filed May 19, 1971, p. 4). However, they claim that this interest must submit to the superior right of the parents and guardians " . . . to direct the upbringing and education of the children under their

control." (Id.)[11] Plaintiffs cite *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923) and *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925), as support for their position.

The rationale underlying Justice McReynolds' decisions for the Court in *Meyer* and *Pierce* has been decisively rejected in later cases.[12] The concept of the Due Process Clause of the Fourteenth Amendment as being a grab-bag of substantive rights has held little currency for over thirty years. However, the question of whether or not the holdings in *Meyer* and *Pierce* retain any validity is not before this court. This is so because the language of both of those opinions makes it clear that the Court, in holding as it did, had no intention of abridging, and indeed specifically recognized, the power of the state to dictate a curriculum for use in public schools.

In *Meyer*, the Court struck down a Nebraska statute which made it illegal to teach a foreign language to students who had not completed their eighth grade. Meyer, originally the defendant in the case, was a teacher in a parochial school maintained by the Zion Evangelical Lutheran Congregation. Finding that the statute in question violated Meyer's rights under the Due Process Clause

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[11] The argument that parents' rights are superior to those of the state is a double-edged sword. There are admittedly many issues in educational policy upon which parents will differ. Were each child to be educated solely in accordance with its parents' views on education, public education as such would become impossible.

[12] *See, e.g.*, *West Coast Hotel* v. *Parrish*, 300 U.S. 379, 57 S.Ct. 578 (1937); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 72 S.Ct. 405 (1952); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461 (1955); and see McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Supreme Court Review 34.

of the Fourteenth Amendment, the Court stated that "[h]is right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment." 262 U.S. at 400, 43 S.Ct. at 627. The rights of parents, however, were not without substantial limitations:

> . . . The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. *Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports.* Those matters are not within the present controversy. [Emphasis supplied.] 262 U.S. at 402, 43 S.Ct. at 628.

Pierce involved an Oregon statute requiring every parent or guardian of a child between the ages of 8 and 16 years to send the child to a public school. Two suits, both involving organizations which ran private schools, challenged the constitutionality of the statute. The Court, citing *Meyer*, again found the statute under scrutiny to be void as in violation of the Due Process Clause. The specific right which the Court found to be unconstitutionally infringed was the right of the defendant organizations to run schools. 268 U.S. at 543, 45 S.Ct. at 573.

Despite the holding of the Court, the opinion carefully affirmed the state's general power over the education of children. It said:

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some

> school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare. 268 U.S. at 543, 45 S.Ct. at 573.

Meyer and *Pierce*, then, cannot be read to stand for the broad proposition advanced by the plaintiffs: that parents' rights to direct the education of their children are necessarily superior to the rights of the state. In *Prince* v. *Massachusetts*, 321 U.S. 158, 64 S.Ct. 438 (1944), the Court dealt with the parent-state conflict in a more modern manner. In that case the guardian of a minor child had been convicted of violating a penal statute regulating the labor of children, in that she had permitted her ward, a small girl, to sell the publications of the Jehovah's Witnesses on the streets at night. The appellant argued that the statute (a) violated her First Amendment right to free exercise of her religion, and (b) violated her rights as a parent and guardian under the Due Process Clause, citing *Meyer*. Characteristic of the change in judicial philosophy which had intervened, the Court commented on the appellant's Due Process claim: "The due process claim, as made and perhaps necessarily, extends no further than that to freedom of religion, since in the circumstances all that is comprehended in the former is comprehended in the latter." 321 U.S. at 164, fn. 8, 64 S.Ct. at 441, fn. 8. In rejecting the appellant's claim, the Court referred to the protection given by the Court in *Pierce* and *Meyer*, stating that ". . . neither rights of religion or parenthood are beyond limitation." 321 U.S. at 166, 64 S.Ct. at 442. After detailing the instances in which the state's power over

the education, rearing and upbringing of a child had been upheld, the Court concluded that

> "... the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." 321 U.S. at 167, 64 S.Ct. at 442.

Having decided that there is no absolute right in the parent to control all aspects of his child's education in the public schools, this court can find no substance or precedent for the argument that the parent has a specific right to control what literature shall be available to the child in school. No cases have been cited to the court, nor has the court been able to find any, which would substantiate that claim. It must thus be concluded that as between the state, represented here by the Board, and the parents, it is the state, under its general power to control curriculum in the public schools, which has discretion over the choice of library books.

Plaintiff teachers, librarian, and Principal claim a loss of "academic freedom" caused by the removal of the books, and further, an interference with their "right" to freely practice their profession in accordance with professional standards. They cite *Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969) and *Parducci* v. *Rutland*, 316 F.Supp. 352 (M.D. Ala. 1970) in support of their claim.

In *Keefe*, an English teacher assigned an article in the *Atlantic Monthly* as required reading for his English class. The school authorities found the article offensive and were about to take disciplinary action against the teacher when he brought suit to restrain them from so doing. The lower court refused to enjoin the disciplinary proceedings, but the Court of Appeals reversed. The reversal was based on procedural due process problems which are unrelated

to the instant discussion. *Parducci* is similar. There, a teacher was discharged for assigning to her high school class a certain short story repugnant to the school authorities. The district court ordered her reinstatement.

Both *Keefe* and *Parducci* involved procedural due process problems of notice that are not present here. This court will not attempt to divine the attitudes of the courts involved were they to be presented with cases not including such problems. It is true that in both cases the courts ruled on the suitability of the literature in question for the minds of high school students, finding that the respective article and story were indeed suitable. Nevertheless, this court has no need to do so, as no employee, teacher or otherwise, has been disciplined or threatened with discipline in the instant proceeding. Nor have any teachers been instructed not to assign the book. Thus, it is apparent that no right of academic freedom has been infringed.

As for plaintiff teachers' contention that they have a "right" to freely practice their profession according to professional standards, no authority has been cited and none found. If by so stating plaintiffs intimate that they seek to resurrect the discredited theory of "substantive" due process (see *supra*, n. 12), their argument must fail. The cases which have been cited by plaintiffs as general support are inapposite.[13]

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[13] *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675 (1967), held that a statute providing for dismissal of university personnel for seditious statements or acts was void for vagueness. *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 76 S.Ct. 637 (1956), held that dismissal of a publicly employed professor for refusal to testify before a Congressional Committee violated his right to procedural due process. *Vought* v. *Van Buren Public Schools*, 306 F.Supp. 1380 (E.D. Mich. 1969), while sustaining the schools' right to promulgate a regulation forbidding possession of obscene material on school grounds, held that a student could not be expelled on the charge of such possession without a hearing.

After due consideration, this court must conclude that the claim of plaintiffs herein presents no federal question. The court has not considered the educational value of the book or the harm it might inflict on young children. The court refuses, as requested by the defendant Board, to consider whether there is a factual basis for its resolution of June 2, 1971. These issues are not relevant to the instant claim. They may be discussed and litigated elsewhere. Plaintiffs have available administrative and state remedies, since their claim is not of constitutional magnitude. In the final analysis, they have their right to challenge Board policy at the next election of Board members.

Findings of fact and conclusions of law as required by F.R.Civ.P. Rule 52(a) are included in the body of this opinion.

The Clerk is directed to enter judgment dismissing the complaint and it is

So ORDERED.

JACOB MISHLER
U. S. D. J.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of March one thousand nine hundred and seventy-two.

Present:

HON. HAROLD R. MEDINA,
HON. J. EDWARD LUMBARD,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend, BERNARD DALY; MARRY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES & EVELYN SUSSMAN,

Plaintiffs-Appellants,

v.

COMMUNITY SCHOOL BOARD NO. 25; CORMAN K. MEAGHER, individually and as Community Superintendent of Community School District No. 25,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk.

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JUL 17 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-109

PRESIDENT'S COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lee Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PEREZ; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

—against—

COMMUNITY SCHOOL BOARD No. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25, and ANTOINETTE MCCARTHY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

LEWIS KARP
Attorney for The Authors League of America, Inc., Amicus Curiae
120 Broadway
New York, New York 10005

Supreme Court, U.S.
FILED
NOV 6 1972

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

—against—

COMMUNITY SCHOOL BOARD No. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25, and ANTOINETTE MCCARTHY,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Authors League of America, Inc. respectfully petitions for leave to file the annexed brief *amicus curiae* in this proceeding. The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in cases involving the rights of free speech and press. Because determination of the issues involved in this case will significantly affect those fundamental rights, the Authors League respectfully applies for leave to file its brief *amicus curiae.*

Counsel for the Applicant is familiar with the questions involved in this case, and the scope of their presentation, and believes that there is necessity for additional argument on the points specified in the brief.

The right to circulate books, which is protected by the First Amendment (*Bantam Books* v. *Sullivan*, 372 U.S. 58, 65 (1963), is of paramount importance to authors and publishers. Without it, freedom to write and publish can be made meaningless formalities. School libraries and public libraries are the most important means of circulating books to teenage and college students, more so than bookstores. The Circuit Court's opinion places in the hands of local school and library boards unlimited power to infringe that right of circulation by removing or banning from library shelves those books which are repugnant to the personal views of transitory majorities of laymen on these boards.

If District Board No. 25 can remove DOWN THESE MEAN STREETS from its libraries' shelves, then it or any other school or library board—applying only the subjective opinions of its majority—can remove from their library's shelves books of merit which had been chosen by competent professionals. This form of grass roots restraint on free speech is far more pervasive and damaging that the occasional criminal prosecution of a book's publisher or seller, which can be defeated in an adversary judicial procedure. Allowed to go unchecked, it poses a real, not a theoretical, threat to freedom of expression—and freedom to read.

For the reasons set forth in the attached brief, we submit that the Board's order, on its face, violated the First Amendment; and that the Order and the Statute and Regulations which authorized it, were so vague and ambiguous as to violate the First and Fourteenth Amendments.

Because the Authors League of America believes that vital First Amendment rights of authors and publishers are involved, it respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

IRWIN KARP
Attorney for the Authors League of America, Inc.

TABLE OF CONTENTS

	PAGE
Brief of The Authors League of America	1
Interest of The Authors League	1
Summary of Argument	2
POINT I—The Board's Order Violated First Amendment Rights	2
(i) The Nature and Scope of the Issue	2
(ii) A School Board Must Comply with the First Amendment	4
(iii) The Board's Order Violated the Right of Circulation protected by the First Amendment	5
(iv) The Statute and Regulations underlying the order violated the First Amendment	7
(v) The District Court had Jurisdiction to Decide these First Amendment Issues	8
POINT II—The Board Violated the First Amendment Rights of the Author and Publisher of DOWN THESE MEAN STREETS	9
POINT III—The Board's Order Violated the First Amendment Rights of the District's Teachers and Students	11
CONCLUSION	13

AUTHORITIES CITED

Cases

	PAGE
Bantam Books v. *Sullivan*, 372 U.S. 58	5, 6, 8, 9
Barrows v. *Jackson*, 346 U.S. 249	10
Board of Education, Otego v. *Rickard, et al.*, 32 A D 2d 135	8
Epperson v. *Arkansas*, 393 U.S. 97	11
Freedman v. *Maryland*, 380 U.S. 51	8
Ginsberg v. *State of New York*, 390 U.S. 629	5
Jacobellis v. *Ohio*, 378 U.S. 184	9
Keyishian v. *Board of Regents*, 385 U.S. 589	11, 12
Lamont v. *Postmaster General*, 381 U.S. 301	6, 11
Lovell v. *Griffin*, 303 U.S. 444	5
Matter of Figari v. *N. Y. Tel. Co.*, 32 A D 2d 434	8
Pierce v. *Society of Sisters*, 268 U.S. 510	10
Shelton v. *Tucker*, 364 U.S. 479	8
Speiser v. *Randall*, 357 U.S. 513	8
Staub v. *City of Baxley*, 355 U.S. 313	9
Time, Inc. v. *Hill*, 385 U.S. 374	10
Tinker v. *Des Moines School District*, 393 U.S. 502	4, 11
Winters v. *New York*, 333 U.S. 507	7

Statutes

Sec. 310(5), (6), N. Y. Education Law	8
Sec. 2590-c, N. Y. Education Law	3
Sec. 2590-e(3) N.Y. Education Law	7

Regulations

8 N.Y. Code, Rules & Regs. (Educ.) Sec. 91.1(b) (1966)	7

IN THE

Supreme Court of the United States

October Term, 1972

No.

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

—against—

COMMUNITY SCHOOL BOARD No. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25, and ANTOINETTE MCCARTHY,

Respondents.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA

Interest of The Authors League

The Authors League, a national society of writers and dramatists, is deeply concerned with preservation of the First Amendment freedoms to write, publish, circulate and read books. The decisions of the Court of Appeals and District Court pose a serious threat to the freedom to circulate books to students through school libraries and public libraries. The Authors League believes that these decisions, and the opinions of the Courts, open the door to widespread grass roots censorship of these libraries.

Summary of Argument

I. The basic issue is whether a transitory majority of laymen on a school board can remove or ban a book from the school libraries because it offends their personal sensibilities. A school board must comply with the First Amendment. The action of the District No. 25 Board in removing DOWN THESE MEAN STREETS from the junior high school libraries, for which it had been selected by the District's professional librarian, infringed the right of circulation protected by the First Amendment. Moreover, the Statute and Regulations on which the order depended were so vague and ambiguous as to violate the First and Fourteenth Amendments. The District and Circuit Courts correctly recognized that they had jurisdiction to decide the substantive constitutional issues presented, on the merits.

II. The Board's actions violated the First Amendment right of the author and publisher to have the book which had been selected by the professional librarian circulated in the school libraries of District No. 25.

III. The Board's action violated the First Amendment rights of the District's libraries, teachers and students.

POINT I

The Board's Order Violated First Amendment Rights.

(i) The Nature and Scope of the Issue

The Court of Appeals turned the issue inside out when it suggested it was protecting "academic freedom" by sustaining the Board's order. It said that "Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars."

What actually happened was that five laymen, a majority of the Board, intruded on the academic freedom of the professional librarian and teachers—the real "community of scholars"—who had selected DOWN THESE MEAN STREETS for the libraries of District 25's three junior high schools. And the real issue is whether that "intrusion", by laymen on the community of scholars—on its face, and absent any specific and clear-cut statutory guidelines—violated the First Amendment rights of the author and publisher, the librarian and teacher, the parents and students—and the public of the School District.

The members of the District 25 Board were not scholars or experts in curriculum and library selection. Nor did they evidence any expertise in (or understanding of) First Amendment principles, or the application of these principles to book selection or book removal. They were far less qualified than Federal judges to decide whether DOWN THESE MEAN STREETS should be banned, or placed in coventry; although it was selected by professional librarians and teachers, had been well reviewed and recommended for teenagers, and did not violate New York laws against obscene material for minors.

The constitutional issue is, of course, far more extensive than the one book. The Court of Appeals denigrated the dispute, seeing it only as "ensuing shouts" in an "intramural strife" over the choice of books. What is really involved is the power of laymen, elected for a brief term, to remove or ban books from school libraries (throughout the State, and the country) because the books offend their personal sensibilities. Members of the New York City Community School Boards are elected for a two-year term (Sec. 2590-c, N. Y. Educ. Law). Under the Court's opinion, a new

majority could purge the junior high school library of books selected by this board (no less resanctify DOWN THESE MEAN STREETS as suitable for teenagers). And two years later, another transitory majority could remove or ostracize any book selected by librarians and teachers during the prior board's regime—and prevent or restrict their circulation by the libraries, and thus the right of teenage students to read them. Moreover, the Court of Appeals opinion gives school board majorities carte blanche to ban books (selected by the professional staff) which offend their personal political or social sensibilities, as well as those which describe life in a ghetto so vividly as to upset them.

When a handful of laymen, temporarily ensconced as a "school board", decide that a book of general interest must be removed from the library shelves of a school system, or barred from those shelves—they are taking an official action which affects rights to publish, circulate and read the book, rights which are protected by the First Amendment. The board's action must not, in itself, violate the First Amendment and the regulations and guidelines under which it is taken must not violate the First Amendment. We respectfully submit that on both counts, the District 25 order was unconstitutional.

(ii) A School Board Must Comply with the First Amendment

In *Tinker* v. *Des Moines School District*, 393 U.S. 503, 507 (1969) the Court emphasized that the Bill of Rights applies to the State "and all of its creatures—Boards of Education not excepted" and that their duty to

> ". . . educat(e) the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free

mind at its source and teach youth to discount important principles of our government as mere platitudes."

(iii) The Board's Order Violated the Right of Circulation protected by the First Amendment

The Court has held that the First Amendment protects "the circulation of books as well as their publication. *Lovell* v. *Griffin*, 303 U.S. 444, 452 . . ." *Bantam Books* v. *Sullivan*, 372 U.S. 58, 65 (1963). Otherwise the State could compel books to be published in a vacuum, by banning their circulation—thus suppressing the author's freedom to communicate with the public.

The "circulation" of books by school and public libraries is essential to the process of communication protected by the First Amendment. For Americans in schools and colleges, it is the paramount means of circulation, far exceeding book stores in importance and reach. If the Queens District Attorney had prosecuted a District 25 school librarian for distributing DOWN THESE MEAN STREETS, or threatened prosecution, the Federal Courts would have acted to prevent that restraint on the First Amendment right to circulate the book to teenagers [since it was not obscene under the standards of *Ginsberg* v. *State of New York*, 390 U.S. 629 (1968)]. See cases collected in note 8 at p. 67, *Bantam Books* v. *Sullivan*, supra.

The Board's order was also a restraint on that right of circulation. DOWN THESE MEAN STREETS was on the District 25 library shelves and was being circulated when the Board acted—to take it off the shelves and prevent it from being circulated and read. This was a deliberate and official restraint on that right of circulation. The book had

not become "obsolete", any more than the "Barrio" whose life it depicted. Indeed, the Board did not claim to remove the book because it was obsolete or because the shelf space was needed for other books. The Board's majority terminated the book's right to be circulated through the school's libraries because they were offended by its language and its portrayal of life in a New York ghetto.

It must be emphasized that here the Board was removing a book already selected; not refusing to approve the purchase of a book not yet on the shelves. Certainly where a transitory majority of a school board acts to *remove* or *restrict* a book already selected and circulating, the minimal protection the First Amendment requires (in addition to the safeguards discussed in IV *infra*) is a clear-cut statement by the Board of the specific educational factors on which it bases its action, to guard against the obvious danger that the majority may order book removals or bans because of its personal political or social viewpoints rather than sound educational considerations.

Moreover, the Board's actions in first removing the book (a power which the Court of Appeals clearly held it possessed) and then directing it could only be loaned to parents were both unconstitutional. The latter step prevented students from having access to the book; and placed a taint on it which is likely to discourage the timid parent or student from requesting this now "forbidden fruit." This type of restraint by inhibition was held unconstitutional in *Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (1965). It effectively restrains the author's and publisher's right to have the book circulated to those who want to read it. cf. *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963).

(iv) The Statute and Regulations underlying the order violated the First Amendment

The statutory sanction for the Board's action was so vague and indefinite as to restrain rights guaranteed by the First and Fourteenth Amendments. *Winters* v. *New York*, 333 U.S. 507, 509 (1948). Here the School Board acted as legislator, judge and jury. The basis for its action was not even a vague regulation. The only standard for judging the book was the subjective opinions of some of the Board members.

According to the Circuit Court, the Board's action was authorized under a Regulation of the New York Commissioner of Education and Sec. 2590-e(3) of the New York Education Law. The Law gives the Board power to "determine matters relating to the instruction of students, including the selection of textbooks and other instructional materials . . ." provided they are approved by the Chancellor. The Commissioner's regulation says that secondary school book collections "shall consist of books approved as satisfactory for (1) supplementing the curriculum (2) reference and general information (3) appreciation and (4) pleasure reading." (8 N.Y. Code, Rules & Regs.) (Educ. Sec. 91.1(b) (1966).

We respectfully submit that these broadly worded provisions afford no standards whatsoever to guide laymen in applying First Amendment principles when deciding whether to remove or bar "reference and general information" books from the libraries of their district schools (even though the books have been approved by the Chancellor and selected by professional librarians and teachers). The unlimited power of selection or banning gives the transitory

majority of a board great opportunities to impose their personal social and political views on the teachers and public of the school district, through the selection process—thus restraining the constitutional rights to circulate and read books. The First Amendment requires that the standards guiding these lay officials in this sensitive work be specific, not vague and ambiguous. *Bantam Books* v. *Sullivan*, 372 U.S. 58, 66 (1963); *Shelton* v. *Tucker*, 364 U.S. 479, 488-9 (1960); *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958). Certainly the statute and regulation empowering the Board's book-banning order do not meet these First Amendment requirements. Moreover, the Regulations and Statute do not provide adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

(v) The District Court had Jurisdiction to Decide these First Amendment Issues

The Circuit Court, in deciding the substantive issues involved, recognized that the District Court had jurisdiction of the controversy. That is consistent with the New York courts' interpretation of Sec. 310 of the New York Education Law, which permits administrative appeals to the Commissioner of Education from decisions of District School Boards (including those involving book selection or banning). The New York courts have consistently held that where a constitutional issue, or the legality of an administrative ruling, is involved, those aggrieved may appeal directly to the courts and need not first exhaust this "administrative" remedy. *Board of Education, Otego* v. *Rickard, et al.*, 32 A D 2d 135, 300 N.Y. Supp. 2d 472 (3d Dept., 1969); *Matter of Figari* v. *N. Y. Tel. Co.*, 32 A D 2d 434, 303 N.Y. Supp. 2d 245 (2d Dept. 1969).

As Mr. Justice Brennan declared in *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964), in cases

> ". . . involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." (p. 190)

Moreover since the Board's action was unconstitutional, the plaintiffs were not compelled to exhaust whatever "administrative remedies" might have been available to them. *Staub* v. *City of Baxley*, 355 U.S. 313 (1958). To require the plaintiffs to undergo the expense and burden of additional "administrative" procedures before they could turn to the courts for protection of First Amendment rights would seriously diminish those vital rights.

POINT II

The Board Violated the First Amendment Rights of the Author and Publisher of DOWN THESE MEAN STREETS.

The Court has upheld the right of authors and publishers to oppose restraints directed at others who distribute and circulate their books, since these measures infringe the First Amendment freedoms of the writer and his publisher. *Bantam Books* v. *Sullivan*, 272 U.S. 58 (1963).

The author and publisher of DOWN THESE MEAN STREETS were not parties to the action. But the plaintiffs had standing to ask for the protection of the First Amend-

ment rights involved, whether these be considered "their" rights, those of the author and publisher—or rights existing "for the benefit of all of us." (*Time, Inc.* v. *Hill*, 385 U.S. 374, 389). Moreover, the Authors League, as *amicus curiae* in the District Court and Circuit Court, urged that the Board's order be vacated because it violated the author's and publisher's First Amendment rights, as well as those of the students, teachers and parents.

In *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953), the Court held that there are unique situations in which the parties to a suit may assert the constitutional rights of others who are not before the Court. The Court observed that there are situations "in which it would be difficult if not impossible for the persons whose rights are asserted" to present their grievances (at p. 257). (See also: *Pierce* v. *Society of Sisters*, 268 U.S. 510). Since a book can be subject to innumerable local restraints and actions designed to inhibit its circulation, it is often economically impossible for its author or publisher to directly protect their First Amendment rights by defending every suit or proceeding aimed at the book. The only effective safeguard for an author's and publisher's freedom of expression in a particular community may be the claim of First Amendment protection for their book by teachers, students, librarians or readers, in the community, who choose to defend it against unconstitutional restraints upon its circulation.

POINT III

The Board's Order Violated the First Amendment Rights of the District's Teachers and Students.

The Board has treated as "a mere platitude" the First Amendment rights of libarians and teachers to circulate to students books which they, in their professional judgment, deem suitable. Their rights were infringed by the Board's order, and must be protected. In *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) the Court said:

> " '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). As this Court said in *Keyishian* v. *Board of Regents*, the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.' 385 U.S. 589, 603 (1967)." (p. 104)

> "It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967)." (at p. 107)

The Board's order also infringed the First Amendment rights of the District's junior high school students. In *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965) the Court held that the First Amendment protects the rights to receive and read literature, as well as the rights to publish and circulate. These rights apply to the students who use the District junior high school libraries, as well as to adults who use public libraries. In *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969), the Court said:

> "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." (at p. 506)

As the Court noted, "The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom." (at p. 512) It applies to other aspects of education. One of the most important of these, we submit, is the reading a teenage student does in his school library; ". . . it is also an important part of the educational process." (at p. 512) The library makes available to students a wide range of books, with a rich diversity of ideas and viewpoints, rather than "supervised and ordained" reading of text books. It permits:

> ". . . train (ing) through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)

The students' freedom to read Down These Mean Streets in District 25's libraries was unconstitutionally restrained by the Board's order, and by the Statute and Regulation which sanctioned the order.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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MICHAEL RODAK JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

—against—

COMMUNITY SCHOOL BOARD No. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Question Presented 2

Opinion Below 2

ARGUMENT

The petitioners have no constitutional right to compel the purchase or retention of a particular book in a public school library 6

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Epperson v. *Arkansas*, 393 U.S. 97 (1968) 4, 6, 7, 8

Ginsberg v. *New York*, 390 U.S. 629 (1968) 7

Keefe v. *Geanakos*, 418 F.2d 359 (1st Cir., 1969) 5, 8

Mailloux v. *Kiley*, 323 F. Supp. 1387 (D. Mass., 1971), affd. 448 F.2d 1242 (1st Cir., 1971) 9

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 8

Parducci v. *Rutland*, 316 F. Supp. 352 (M.D. Ala., 1970) 5, 8

Tinker v. *Des Moines School Dist.*, 393 U.S. 503 (1969) .. 4, 10

Other Authorities: PAGE

N.Y. Education Law

Section 2590-e, subd. 3 6

Section 2590-*l* 7

Section 310 7

N.Y. CPLR Article 78 7

Regulations of the N.Y. Commissioner of Education §91.1 6

"Developments in the Law—Academic Freedom," 81 HARV. L. REV. 1045 (1968) 6

IN THE

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PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

—against—

COMMUNITY SCHOOL BOARD NO. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

The petitioners' civil rights complaint was dismissed, for failure to present a federal question, by the District Court for the Eastern District of New York. The Court of Appeals for the Second Circuit affirmed.

Question Presented

A book entitled *Down These Mean Streets*, by Piri Thomas, about life in East Harlem, had been purchased for the libraries in three junior high schools in Community School District 25. Following a parent's complaint as to the book's language and descriptions of heterosexual and homosexual acts, the duly elected Community School Board considered the matter and, at a public meeting, adopted a resolution directing that the book be removed from all student libraries in the district.

This lawsuit followed. Later, the Community School Board adopted another resolution, modifying the original resolution, to provide that copies of the book shall be kept at the schools which previously had the book in their libraries and that the book should be loaned directly to parents of children attending those schools, if the parents request it. Each of the petitioners is associated with one of the three schools which originally had, and still has, a copy of the book in its library.

Each side to the controversy claims professional support for its views.

Do 11 to 15 years old children attending a public junior high school, their parents, some teachers, a principal and a librarian have a constitutional right to compel retention of any particular book in the school libraries in the district?

Opinion Below

The opinion of both the Court of Appeals and the District Court are reprinted in full in the appendix attached to the instant petition (District Court at pp. 12a to 25a;

Court of Appeals at pp. 1a to 11a). Both courts found no merit to the claim that the Community School Board's resolutions violated the Constitution.

The Court of Appeals began by noting that there was no dispute as to the following: the challenged resolutions were duly adopted by the duly and legally elected Community School Board at public meetings; the selection of textbooks and other instructional material has been delegated by the Legislature of the State of New York to the Community School Board; the children in the schools affected range from 11 to 15 years of age; there are state administrative and judicial procedures available to review the actions of the Community School Board (3a-4a).*

The Court described the book and noted that (4a), "Acts of criminal violence, sex, normal and perverse, as well as episodes of drug shooting are graphically described." The Court then noted the differing opinions as to whether the book would have an adverse effect on 11 to 15 year old children (5a).

The Court found that since the responsibility for the selection of books in school libraries rests with the Community School Board, and since state administrative and judicial review procedures are available, it was not appropriate for the Court to review the wisdom of the Community School Board's determination, but only whether the Board violated any First Amendment rights (5a-6a). According to the Court (6a):

> "Since we are dealing not with the collection of a public book store but with the library of a public junior high school, evidently some authorized person or body has to make a determination as to what the library collec-

* Numbers in parentheses refer to pages of the appendix attached to the petition for a writ of certiorari.

> tion will be. It is predictable that no matter what choice of books may be made * * * some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions."

Epperson v. *Arkansas*, 393 U.S. 97 (1968), where the Supreme Court struck down a statute making it unlawful for a teacher in a public school to teach or use a textbook which teaches evolution, was distinguished by the Court on two grounds: 1) The *Epperson* statute was found to be an unconstitutional aid to religion, and here there is no religious freedom question; 2) Here, unlike *Epperson*, there is no ban on the teaching of any theory or doctrine (7a). The Court noted (7a):

> "The problem of the youth in the ghetto, crime, drugs and violence have not been placed off limits by the Board. A book has been removed but the librarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom. The action of the Board does not even preclude the teacher from discussing *Down These Mean Streets* in class or from assigning it for outside reading".

Tinker v. *Des Moines School Dist.*, 393 U.S. 503 (1969), a case involving students' freedom of expression was similarly distinguished (9a). The Court also noted that in those schools which have the book, a parent may borrow it and give it to his child to read (7a).

The Court rejected the contention that, if a book is not legally obscene for purposes of sale to children by a public bookstore, it cannot be excluded from a public school library (8a). It said that such an argument, "equates the public

school library, which has a function as an adjunct to the educational venture, with the entrepreneur seller of books who has no comparable responsibility" (8a).

The Court also answered the claim that a book achieves some sort of "tenure" once it has been selected. It said that the same authority which has the power to make the initial selection clearly also has the power to remove books which become obsolete or irrelevant or were "improperly selected initially, for whatever reason" (8a-9a).

The Court noted that those cases [*Keefe* v. *Geanakos*, 418 F. 2d 359 (1st Cir., 1969) and *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala., 1970)] where the discharge of teachers for assigning certain outside reading was held to be improper, unlike the case at bar, involved the discharge of teachers and procedual due process problems and were, therefore, not in point (10a). The Court also said (10a): "To the extent that these cases hold that first amendment rights have been violated whenever a district court disagrees with the judgment of school officials as to the propriety of material assigned by a teacher to students, we are not in accord."

ARGUMENT

The petitioners have no constitutional right to compel the purchase or retention of a particular book in a public school library.

The Legislature of the State of New York has given to each locally elected community school board the power to select the books offered to students in the school libraries within its district. N.Y. Education Law § 2590-e, subd. 3. The book collection of a public school library is an important and integral part of the total education offered to public school children, and the selection of books for the collection is directly related to the instructional goals of the schools. See Regulations of the N.Y. State Commissioner of Education §91.1. The decision of the Community School Board for District 25, that a particular book ought not to be made available to children aged 11 to 15 years by the school libraries or that it should be made available (in those three libraries in its district which already possessed it) only if requested by a parent, was within its discretion and violated no constitutional right of any of the petitioners.

As this Court stated in *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968):

> "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

See "Developments in the Law—Academic Freedom," 81 HARV. L. REV. 1045, 1051-1054 (1968), cited by the Court at p. 104. The case at bar does not involve any of the elements of constitutional infirmity which have justified

the rare occurrences of judicial intervention in curriculum and school book matters.

The Community School Board exercised its considered judgment as to the suitability of *Down These Mean Streets* for 11 to 15 year old children. As noted by both courts below, the wisdom and efficacy of its judgment is subject to state administrative and judicial review procedures. See N.Y. Education Law §§2590-*l* and 310; N.Y. CPLR Article 78. The petitioners, however, suggest that the power of the Community School Board to select books for school libraries is limited to excluding those books which are legally obscene for children.

They cite *Ginsberg* v. *New York*, 390 U.S. 629 (1968). However, that case merely established that, as to sales of books to children, a different standard of obscenity from the standard for adults may be imposed on public booksellers. As stated by the Court of Appeals below, the petitioners' argument improperly "equates the public school library, which has a function as an adjunct to the educational venture, with the enterpreneur seller of books who has no comparable responsibility" (8a). If the power of selection for educational purposes is to have any meaning, it must include the power to choose between books and to exclude those which are found inadequate, irrelevant, or otherwise inappropriate for the particular children to be served, and not merely the power to exclude those books which have been held to be illegal for sale to minors.

We recognize, of course, that while the Community School Board has broad powers of selection, that power may not be abused so as to make it a means of implementing an unconstitutional state policy. In *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), state law made it a misdemeanor to teach, or use a textbook which teaches, the

theory of evolution. The Supreme Court found that the sole state policy being served by this bar was the favoring of particular religious views, and it held the law to be an unconstitutional establishment of religion. Here, in contrast, no such unconstitutional reason formed the basis of the book's exclusion.

Moreover, in *Epperson*, there was a ban not simply on a particular book's discussion of evolution, but on the entire body of literature on evolution, and there was a ban on teaching the theory as well. Cf. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Here, there has been no restriction whatever on teaching about the Barrio or its problems. As the Court below noted (7a): "The action of the Board does not even preclude the teacher from discussing *Down These Mean Streets* in class or from assigning it for outside reading." The Board has simply decided that the book ought not to be offered to 11 to 15 year old children in their public school libraries, where they are free to take books and read them without the guidance of any teacher. The petitioners' suggestion in their brief (p. 5) that, in rejecting their claims in this case, a court would be sanctioning the actions of "school boards which systematically purged the libraries of all books advocating peace or integration, or their curricula of all courses treating the United Nations" is absurd and ignores the vastly different facts of this case.

In *Keefe* v. *Geanakos*, 418 F. 2d 359 (1st Cir., 1969) and *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala., 1970), relied upon by the petitioners, teachers were dismissed for assigning and discussing works which their supervisors found offensive. As already noted, here there has been no such restriction on teaching or assignments, and thus no violation of any teacher's academic freedom. In addition, both cases involved issues of procedural due

process not present here. See also *Mailloux* v. *Kiley*, 323 F. Supp. 1387 (D. Mass., 1971), affd. with opin., 448 F. 2d 1242 (1st Cir., 1971), a case with similar facts, where the courts relied solely on due process considerations in upholding the teacher.

Assuming arguendo that a public school librarian has any constitutionally protected right to unfettered choice in the selection of books for a public school library, the petitioner librarian here cannot possibly show the deprivation of such a right. She is employed at one of the schools which previously had *Down These Mean Streets* in its library. That library remains in possession of the book, and the librarian may lend it to parents who request it and who may, at their option, allow their children to read it. Surely such a limitation cannot be said to violate the librarian's professional freedom.

The parents of the children likewise have not been deprived of any constitutional right. Each parent in a school district will have his own views, often in direct opposition to those of other parents, as to what books are best suited for a school library's collection. The role of the elected Community School Board, acting in furtherance of its educational goals, and *in loco parentis*, is to make the choice. That a parent may disagree with that choice does not give him a constitutional right to compel the purchase or retention of any particular book, or to compel that it be available directly to students rather than to their parents.

The students have not been deprived of any "right to know." As with the teachers, there has been no ban on the discussion or teaching of any field of study or on the assignment or reading of any book. The mere fact that students in some schools will not have a particular book available to them in their school library, which is of course a library of limited space and financial resources, and

(what the petitioners ignore) a library with special educational purposes, does not deprive the students of their right to read the book, either as part of an assignment by a teacher or on their own. Nor has there been any restriction of the students' freedom to express their political beliefs or any other beliefs or ideas. Cf. *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969).

Unless the exclusion is otherwise improper, the mere fact that a book has been on the shelves and then has been excluded does not enhance the petitioners' claim of unconstitutionality. The power to select necessarily implies a continuing authority to choose new books and omit those which are no longer considered suitable. Moreover, the book was previously available in the school libraries of all the student petitioners and as to those schools the Board has directed that it be kept there and be available for loan on a parent-option basis. Such a plan, where the students have no constitutional right to have the book available at all in their school libraries, raises no constitutional issue.

A school board's judgment concerning what books are appropriate for availability in its school libraries may depend on the age of the children attending the schools. For mature children, it may be improper to exclude certain books. Yet for younger children, it may be clearly constitutionally proper to exclude the same books or place restrictions on their availability. Here the age of the children was 11 to 15. Such a group is sufficiently immature to warrant some limitation on the kind of books made freely available to them.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 28, 1972.

Respectfully submitted,

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SEP 11 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend EDWARD BOCHNER; JEANY LERNER, by her next friend LEA LERNER; IRA DALY, by his next friend BERNARD DALY; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

against

COMMUNITY SCHOOL BOARD NO. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25,

Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Supreme Court.

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Table of Contents.

	Page
Facts	2
Reasons for Denying the Writ	3
Conclusion	7

STATUTES.

New York Education Law, Section 2590-E	2
New York Civil Practice Law and Rules, Article 78	2

In The

Supreme Court of the United States

October Term. 1971.

No. .

Presidents Council, District 25; Jeffrey Bochner, by his next friend Edward Bochner; Jeany Lerner, by her next friend Lea Lerner; Ira Daly, by his next friend Bernard Daly; Mary Finnegan; Morris Reich; Myrna Sutz; Josephine Pizer; Walter Michael; Carola Michael; Lea Lerner; Bernard Daly; Ruth Daly; Merill Youkeles; Evelyn Sussman,

Petitioners,

against

Community School Board No. 25; Cormac K. Meagher, individually and as Community Superintendent of Community School District No. 25,

Respondents.

Appeal from the United States District Court for the Eastern District of New York.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Supreme Court.

This brief is submitted on behalf of the defendant Antoinette McCarthy, individually and as representative of the Committee for Parent's Rights in Public Education. Mrs. McCarthy was not an original defendant but moved to intervene subsequent to the filing of the com-

plaint. The motion was granted by the District Court. The Committee for Parent's Rights in Public Education submitted over 700 parents' signatures to a petition opposing the return of the book Down These Mean Streets to the open shelves of the Junior High School Libraries in Public School District No. 25.

Facts.

The following facts were either conceded or uncontested in the District Court:

1. The Board is the duly and legally elected Community School Board of Community School District No. 25.

2. The power of the state to determine matters relating to the education of students, including the prescription of a curriculum and the selection of textbooks and other instructional material, has been delegated by the New York State Legislature to the duly elected Community School Boards in New York City (New York Education Law, Section 2590-E).

3. Pursuant to resolution duly adopted by the Board, the book *Down These Mean Streets* by Piri Thomas was removed from the school libraries from Junior High Schools No. 185, 189 and 218 pursuant to the resolution adopted by the Board on April 19, 1971.

4. The students at Junior High Schools No. 185, 189 and 218 range in age from eleven (11) to fifteen (15) years.

5. The State of New York has provided administrative procedures for the review of arbitrary actions on the part of Community School Boards and final administrative action is reviewable under Article 78 of the New York Civil Practice Law and Rules (A-224-225).

6. Those schools which previously had the book in their respective libraries, were directed by the School Board to implement a procedure to loan said book directly to the parents of the children attending those schools who request the book (A-113).

Reasons for Denying the Writ.

Contained in petitioner's brief (pp. 4 through 7) under the heading "*Reasons for Granting The Writ*" is an analysis of the purported constitutional issues that the petitioner claims is involved in the case at bar, and which said issues the petitioner claims are important that this court review.

The petitioner has stated that "* * * local pressure groups succeed in persuading School Boards to purge controversial books, * * *" and that the issue to be decided by the court is "* * * to what extent are school professionals at the mercy of politically responsive, often elected, lay boards of education in determining what their students may read and learn in the schools." Petitioners further urge that the court below "* * * indicated that libraries are not an area in which constitutional freedoms need receive 'vigilant protection'," and that "* * * the courts below would apparently not interfere with School Boards which systematically purge the library of all books advocating peace or integration, or their curricula of all courses treating the United Nations." The petitioner further urges that the Federal Judiciary not "* * * indulge such direct political intrusion into the materials that teachers will be permitted to assign." And that the plaintiffs are turning to the Federal Courts because "* * * their libraries and their curricula are stripped of books which happen to be in political disfavor with a shifting majority of the School Board * * *"

These extraordinary distortions of the issues presented in the case at bar constitute an outrageous imposition upon this court. There is not one shred of evidence in the record that "local pressure groups succeeded in persuading School Boards to purge controversial books" nor is there one shred of evidence in the record that there was any "political intrusion into the materials that teachers will be permitted to assign."

As stated by Circuit Judge Mulligan, writing for the United States Court of Appeals Second Circuit of New York (p. 7A of the Appendix):

> "The problems of the youth in the ghetto, crime, drugs and violence have not been placed off limits by the Board. A book has been removed but the librarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom. The action of the Board does not even preclude the teacher from discussing "Down These Mean Streets" in class or for assigning it for outside reading. In those libraries which have the book, the parent can borrow it and, if he sees fit, can loan it to his child if he wishes to read it" (p. 9A of Appendix).
>
> "There is here no problem of freedom of speech or the expression of opinions on the part of parents, teachers, students or librarian. As we have pointed out, the discussion of the book or the problems which it encompasses or the ideas it espouses have not been prohibited by the Board's action in removing the book."

The defendant Board has rightfully determined that the book Down These Mean Streets is not a fit and proper educational tool to remain on the open shelves of a Junior High School library available for 11 to 15-year-olds. Judge Mulligan described this book as follows:

Page 4A of Appendix:

> "The book, which has created the controversy and provoked the action of the Board, Down These Mean Streets, is an autobiographical account by Pirie Thomas, of a Puerto Rican youth growing up in the East Side Barrio (Spanish Harlem) in New York City. Predicably, the scene is depressing, ugly and violent. The argot of the vicinage is replete with four-letter and 12-letter obscenities unreported by Tom Swift or even Tom Jones. Acts of criminal violence, sex, normal and pervert as well as episodes of drug shooting are graphically described."

The decision of the duly constituted School Board acting under its lawful authority (there is no claim that the law under which the School Board derived its authority is in any way unconstitutional) determined in their wisdom and discretion that the aforesaid book was not a proper vessel and means for educating the students. In no way, shape or form did the action of the School Board in any way prevent, stop or terminate the teaching of any ideas or subjects in these Junior High Schools. In fact, the record showed that, in the social studies courses, problems of the ghetto are taught and discussed and, in addition, the schools have sex education courses.

The petitioner argues that the United States Court of Appeals "matter of factly" answered that someone has to make a determination as to what the library collection will be and that the court below further suggests that "*any* determination" which the Board makes is beyond "judicial review" (p. 8, petitioner's brief). The petitioner further states that the Court of Appeals "conveniently ignored * * * the fact that the book itself cannot be read."

Here, again, the petitioner levels uncalled for and unfair strictures upon the learned and scholarly judge who wrote the unanimous decision of the United States Court of Appeals. These liberties are very frankly further impositions on this court.

There was nothing "matter of fact" about the scholarly decision of Judge Mulligan nor that of Judge Mishler, the Presiding Judge of the United States Court, Eastern District of New York. The Court of Appeals never suggested that "any determination which the Board makes regarding its library collection is beyond judicial review." Nor did the Court of Appeals "conveniently ignore" anything. Conveniently ignored by the petitioner is the fact that this book is available to the parent of any student in Junior High School who wishes to borrow the book and said parent is then free to allow his child to read the book if the parent so wishes. Conveniently ignored by the petitioner is the fact that the facts of the case at bar present no intrusion upon the subject matters which students in these schools may be exposed to and learn. Conveniently ignored by the petitioner is the fact that the crux of the dispute is a disagreement as to whether this book is a suitable educational tool for use on the open shelves of a Junior High library.

A decision has been made by a majority of the duly elected local School Board based solely upon their belief as to what is best educationally and psychologically for the 11 to 15-year-old under their jurisdiction. If this decision were arbitrary or capricious, the plaintiffs have available adequate administrative remedies under the laws of the State of New York. The claim that this book was removed from the school library because it was "in political disfavor" with a shifting majority of the School Board is an outrageous fiction. On the contrary, the plaintiffs are attempting to use the Federal Court as a

means of imposing their educational values and judgments upon the majority of the parents of the students in Junior High School who are represented by the majority of the School Board.

As stated by Judge Mulligan (p. 6A, Appendix):

> **"Our function is purely one of constitutional adjudication on the facts and the record before us: Has the Board transgressed the first amendment rights of the plaintiff teachers, parents, librarian and children."**

The decision by Judge Mishler in the District Court and by Judge Mulligan speaking on behalf of the unanimous Court of Appeals clearly demonstrate that there has been no constitutional abridgment of any first amendment rights of the plaintiffs.

Conclusion.

The application for a writ of certiorari submitted by the petitioner should be denied.

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